IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 25-1-2002

Coram:

THE HONOURABLE MR. JUSTICE M. KARPAGAVINAYAGAM

CRIMINAL APPEAL No.261 of 2000 and CRL.R.C. No.736 of 1999 and Crl.M.P.No.6440 of 2000

Y.Sreelatha @ Roja .. Appellant in C.A.
261/2000 & Respt. in
Crl.R.C.736/1999.
Vs.

Mukanchand Bothra .. Respondent in C.A.
261/2000 & petitioner
in Crl.R.C.736/1999.

Criminal Appeal preferred by the accused against the judgment dated 8.6.1999 on the file of the XV Metropolitan Magistrate, Chennai. Criminal Revision case preferred by the complainant against the judgment dated 8.6.1999 on the file of the XV Metropolitan Magistrate, Chennai.

! For Appellant : Mr.Vibhishman in CA261/2001
& Respondent in Crl.R.C.736/1999

For Respondent: Mr.K.Doraisami,S.C.
in CA261/2001 & For Mr.K.Selvaraj.
in CA261/2001 & For Mr.K.Selvaraj.
Petitioner in Crl.R.C.736/1999
Petitioner in Crl.R.C.736/1999

: COMMON JUDGMENT

Y.Sreelatha @ Roja was convicted by the trial Court for the offence under Section 138 of the Negotiable Instruments Act

and sentenced to undergo imprisonment till the rising of the Court and to pay a fine of Rs.5,000/-, in default to undergo S.I. for two months. Challenging the said conviction and sentence, the accused filed an appeal before the Principal Sessions Court, Chennai and the same was admitted on 3 .8.1999.

2. Mukanchand Bothra, the complainant, aggrieved over the inadequacy of the sentence, filed a revision before this Court in Crl.R.C.No.73 6 of 1999 and the same was admitted and notice was ordered on 23.7.19 99.

3. On the application filed by the parties before this Court, the appeal against conviction pending before the Principal Sessions Court, Chennai, was directed to be posted before this Court for being heard along with Crl.R.C.736 of 1999. Accordingly, the said appeal papers were received by the Registry of this Court a nd the same was renumbered as C.A.No.261 of 2000. Since both these matters are taken together for final disposal, they are being disposed of through this common judgment.

4. The facts of the case in short are these:-

"(a) V.Sreelatha @ Roja, the accused, borrowed a loan of Rs.5 lakhs from Mukanchand Bothra, the complainant, and executed a promissory note on 5.7.1996. In order to discharge the said loan, towards a part liability, the accused issued two cheques, each for Rs.1 lakh bearing the dates 30.5.1997 and 31.5.1997. On 2.6.1997, the complainant presented these cheques for encashment and the same were returned as " not arranged forö by intimation dated 4.6.1997. Thereafter, the complainant issued a statutory notice on 10.6.1997 calling upon the accused to discharge the entire cheque amount of Rs.2 Lakhs. Despite receipt of the said statutory notice on 12.6.1997, the accused neither paid the amount nor sent any reply. Hence, the complainant filed a complaint under Section 138 of the Negotiable Instruments Act through his Power of Attorney one Bhoopathy.

(b) On the basis of the sworn statement taken from the said Bhoopathy on 17.3.1998, the case was taken on file and summons was issued to the accused. After appearance, the trial was proceeded with.

(c) During the course of trial, the complainant examined himself as P.W.1 and the Bank Officer, who returned the cheque as ônot arranged forö, was examined as P.W.2 through whom Exs.P-1 to P-9 were marked. On the side of defence, D.Ws.1 to 5 were examined and Exs.D-1 to D-4 were marked.

(d) The trial Court ultimately concluded that the prosecution proved its case and found the accused guilty for the offence under Section 138 of the Negotiable Instruments Act and sentenced

her to undergo imprisonment till the rising of the Court and to pay a fine of Rs.5,000 /-."

5. The points urged by the learned counsel for the appellant/ accused could be summarised as follows:-

"(i) The complainant, instead of filing the complaint directly, has filed the complaint through Power of Attorney. The power of attorney holder is not competent to speak about the transaction that took place between the payee and the drawer of the cheques. Further, the document for the power of attorney was not filed.

(ii) The name of the payee has not been correctly written in the cheques in question. The complainantÆs name is MUKANCHAND BOTHRA. But, the cheques were issued in the name of MUKALCHAND BOTHRA. Therefore, complainant is not the payee of the cheques in question and as such, he can not institute the complaint.

(iii) The complainant did not prove that there was a legally enforceable debt by producing the receipts or vouchers to show that the loan was lent to the accused. Though the complainant claimed himself as a financier, D.W.3 Deputy Tahsildar stated that the complainant does not have the licence to carry on the money lending business. Further, he has not filed the income tax return showing the said loan. D. W.2, the Income Tax Officer, deposed that the complainant did not file his return subsequent to 1991. Therefore, the evidence of P.W.1 that he gave the loan to the accused is false.

(iv) The cheques in question bearing dates 30.5.1997 and 31.5.1997 would not have been issued after the date of the promissory note (i.e.,) 5.7.1996, as the complainant himself admitted that the agreement was executed on 30.12.1995. The complainant received several cheques and promissory notes from the accused and her brother for security purpose during the year 1993 to 1995 and some of the cheques were misused by filing both civil suits and criminal complaints including the present false complaint in order to coerce the accused and tarnish her popularity as movie star. The accused was merely a guarantor to the said agreement and she issued those cheques as security only."

6. On the basis of these points, the learned counsel for the accused would submit that the conviction imposed by the trial Court is not valid and consequently, the accused is entitled to be acquitted.

7. While both these matters were taken up for final disposal and the arguments were heard, the accused/appellant chose to file an application before this Court in Crl.M.P.No.6440 of 2000 to permit her to adduce additional evidence under Section 391 Cr.P.C. pending appeal.

8. In reply to the various points urged by the learned counsel for the accused, the learned senior counsel for the complainant would submit that all these points have been correctly dealt with by the trial Court and while rejecting the said contentions, proper reasonings have been given by the trial Court for basing the conviction.

9. The learned senior counsel for the complainant would further submit that in regard to inadequacy of the sentence, the cheque amount involved in this case is Rs.2 Lakhs and when Section 138 of the Negotiable Instruments Act would provide for the sentence of imprisonment for one year or to pay a fine of twice the cheque amount, the trial Court ought to have imposed appropriate sentence by sending the accused to undergo imprisonment for one year or to pay a fine or compensation to the value of twice the cheque amount.

10. I have heard the contentions urged by the learned counsel on either side and carefully perused the materials available on record.

11. On a careful analysis of the records, I am of the view that none of the grounds urged by the learned counsel for the appellant/ accused would impress me, as the materials available on record would clearly show that the prosecution proved its case beyond reasonable doubt and as such, the findings given by the trial Court for conviction on the accused cannot be said to be wrong.

12. Regarding the first point relating to filing of the complaint through the power of attorney, it is to be stated that during the course of trial, the validity of the cognizance on the basis of the sworn statement of the power of attorney holder was not questioned.

13. Furthermore, there is no law, which prohibits filing of the complaint through power of attorney either on behalf of the individual or on behalf of the company. Only when the validity of the power of attorney is questioned, the Court could be called upon to decide the genuineness or the validity of the power of attorney.

14. In this case, it is noticed that the complaint was taken on file on the basis of the sworn statement given by one Bhoopathy, who is the power of attorney holder. Thereafter, when

the trial commenced, the complainant himself was ready to depose his evidence. When an application was filed by the complainant in Crl.M.P.No.750 of 1999 on 9.4 .1999 seeking for permission to examine him as P.W.1, the counsel for the accused made an endorsement stating no objection for such examination. Accordingly, the complainant, who is the payee and in whose favour the cheques in question were drawn, was examined as P.W.1 in chief and cross.

15. When such being the case, it cannot be contended that the power of attorney holder should not have been allowed to file the complaint. It is true that the power of attorney holder may not be able to give full details of the transaction that took place between the drawer and payee of the cheques, but such lacuna is not available in this case, since the complainant came to the box and subjected himself for cross-examination. Therefore, the first point relating to power of attorney does not merit consideration.

16. Nextly, it is contended that the name of the payee has not been correctly mentioned.

17. It is true that the name of the complainant is MUKANCHAND BOTHRA. It is the case of the complainant that he received the cheques from the accused, which were drawn in favour of the complainant and presented the cheques for collection in Karnataka Bank, where his account is maintained. When the cheques were sent to the State Bank of India, T.Nagar Branch, in which the account of the accused is maintained, it was returned only with the endorsement ônot arranged forö and accordingly, the intimation of dishonour of the cheques was sent by the Karnataka Bank to the complainant. Thus, it is clear that the cheques were not returned on the ground that the name of the payee was not correctly mentioned.

18. On the other hand, a suggestion was put to the complainant that those cheques were issued by the accused in favour of the complainant MUKANCHAND BOTHRA only as security in the capacity as guarantor. It is also noticed that no suggestion was put in the cross-examination that the complainant was not the payee, but someone else.

19. That apart, when the statutory notice was issued by the complainant as payee of the cheques with reference to the dishonour of the cheques, the accused, who received it, did not choose to send any reply raising this sort of plea. Therefore, mere spelling mistake by writing the name of the complainant in the cheques as MUKALCHAND BOTHRA, instead of MUKANCHAND BOTHRA, cannot be a ground to hold that the complainant is not the payee of the cheques. Therefore, this point also would fail.

20. Nextly, it is contended that there is no material to show that there was a legally enforceable debt when the cheques were issued. For this argument, there is no basis.

21. It is the consistent plea of the prosecution through statutory notice, complaint and the deposition that the accused received a loan of Rs.5 Lakhs on 5.7.1996 and when the said amount was demanded, the accused issued two post-dated cheques for Rs.1 lakh each bearing the dates as 30.5.1997 and 31.5.1997.

22. It is the further case of the complainant that while the loan amount of Rs.5 lakhs was given, the accused executed a promissory note in respect of the said amount on 5.7.1996. To establish the said fact, P.W.1 had not only adduced oral evidence, but also marked Ex.P-1 promissory note executed by the accused. He further marked Ex.P-6 statutory notice and Ex.P-7 acknowledgement signed by the accused for having received the said statutory notice.

23. It is also noticed that in the cross-examination of the complainant, suggestions were made by the accused that the debts covered by the cheques were earlier discharged. Under those circumstances, it is clear that the cheques were obtained by the complainant towards discharge of part of the liability in respect of the promissory note executed by the accused for Rs.5 Lakhs.

24. Section 139 of the Negotiable Instruments Act would provide thus:-

ôIt shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, or any debt or other liability.ö

25. The term ôdebt or other liabilityö has been defined in Explanation to Section 138 of the Negotiable Instruments Act, which is as follows:

ôFor the purpose of this Section, ôdebt or other liabilityö means a legally enforceable debt or other liability."

26. Section 118 of the Negotiable Instruments Act would provide for presumption as to negotiable instruments of consideration, which is as follows:-

ôUntil the contrary is proved, the following presumptions shall be made:-

(a) of consideration -ù that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;ö

27. Thus, Sections 118, 138 and 139 of the Negotiable Instruments Act would require that the Court ôshall presumeö the liability of the drawer of the cheques for the amount for which the cheques were drawn on accepting the consideration.

28. Therefore, it is obligatory on the Court to raise this presumption in every case where the factual presumption has been established. Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisi ons by which the court ô may presumeö a certain state of affairs.

29. In other words, when the prosecution provided the facts required to form a basis for presumption, no discretion is left with the Court but to draw the statutory conclusion, in favour of the complainant. In the case of a discretionary presumption, the presumption if drawn may be rebutted by an explanation which ômight reasonably be true and which is consistent with the innocenceö of the accused.

30. In the case of a mandatory presumption ôthe burden on the accused personö would not be a light, as one cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable.

31. The words ôunless the contrary is provedö contained in Sections 1 18 and 139 of the Negotiable Instruments Act would make it clear that the presumption has to be rebutted by æproofÆ and not by a bare explanation, which is merely plausible. Unless the explanation is supported by proof, the mandatory presumption created by the provision cannot be said to be rebutted.

32. It is contended by the learned counsel for the accused that the complainant received several cheques and several promissory notes from the accused and her brother and the same were misused, even though the entire amount of loan had been discharged.

33. When such is the defence case, it is for the accused to adduce oral and documentary evidence to establish that the entire amount had been paid back to the complainant. Unfortunately, in this case, no steps were taken by the accused to prove the same.

34. On the other hand, the accused chose to examine the Income Tax Officer as D.W.2 and the Executive Deputy Tahsildar as D.W.3 to speak about the fact that P.W.1 complainant does not have the licence for money lending and no income tax return was filed showing the loan in the present transaction.

35. Summoning of these witnesses and examining them in the Court are not only unnecessary, but also wasting of the CourtÆs time to the core. As a matter of fact, P.W.1 would admit that he did not possess licence under the Money Lenders Act and he did not file any income tax return.

36. Under those circumstances, it would be sheer waste of time in summoning of these officials to come to the Court and depose the same fact, which had been admitted by the complainant. By adopting this course, the accused has caused inconvenience to the official, defence witnesses, as well as to the Court.

37. On the other hand, the accused must have examined other witnesses or produced documents to show that the loan amount had already been discharged and despite that, the cheques, which were given for the discharge of the loan, were not returned.

38. Though on the defence side, D.Ws.1 to 6 were examined, none of the witnesses would speak about the defence plea raised in this case. That apart, the accused did not care to enter the witness box to support her case.

39. In the light of the materials produced by the complainant through oral and documentary evidence and in the light of the fact that the accused failed to make an attempt to rebut the presumption by proving the defence plea in terms of Sections 118, 138 and 139 of the Negotiable Instruments Act, which is held to be mandatory as per the decision of the Supreme Court in HABBALAPPA DUNDAPPA KATTI AND OTHERS v. STATE OF KARNATAKA (2001 (3) CRIMES 218 (S.C), it has to be held that the cheques had been issued by the accused only towards discharge of the liability and the same had been dishonoured and the cheque amounts were not repaid in time, despite the receipt of the statutory notice.

40. The last point that was urged is that the cheques dated 30.5.1997 and 31.5.1997 would not have been issued, as the agreement was entered into between the parties on 30.12.1995. The complainant never stated that there was an agreement entered into between the accused and the complainant on 30.12.1995 and he would only refer to the agreement entered between the brother of the accused and the complainant, which has no connection with the present transaction.

41. According to the complainant, the accused received a loan of Rs.5 Lakhs and executed the promissory note on 5.7.1996 and while demanding the payment, he received two post-dated cheques dated 30.5.1997 and 31.5.1997. Therefore, the agreement dated 30.12.1995 would not project relevancy with reference to the issue in question.

42. As already stated, once the execution of the cheques is not denied, it shall be presumed under Section 139 of the Negotiable Instruments Act that the cheques were issued by the accused for discharge of the liability, unless it is established through acceptable evidence by the defence to show that the cheques were misused, even though the amounts covered under the cheques were repaid.

43. Therefore, by merely stating that the cheques were given as security in respect of the agreement entered into between the complainant and her brother Kumaraswamy even without examining the said Kumaraswamy as defence witness or by producing the agreement, the Court cannot be asked to accept her plea.

44. Under those circumstances, all these points urged by the learned counsel for the appellant/accused would have to be rejected, particularly, when the evidence adduced by the complainant oral and documentary is acceptable.

45. At this juncture, let us now go to the prayer made in the application in Crl.M.P. No.6440 of 2000 by the accused before this Court seeking permission to adduce additional evidence by summoning various documents.

46. Under Section 391 Cr.P.C., the appellate Court is empowered, if it thinks that the additional evidence is necessary, to record its reason and take such evidence by itself or direct it to be taken by the lower Court.

47. In this case, in the application filed under Section 391 Cr.P.C, it is seen that this Court has been asked to permit the accused to adduce additional evidence by summoning various records relating to several criminal cases pending in various Criminal Courts and the records relating to the civil suits pending in City Civil Court and in the High Court.

48. Though the petition would contain a detailed story as to how the accused was made to face all the proceedings instituted by the complainant, nothing is stated about the necessity or grounds on the basis of which this Court can exercise its power to permit the petitioner to adduce additional evidence.

49. In the present application, no circumstance has been

shown to make this Court to think that the additional evidence is necessary. When those grounds are absent, this Court may not be able to record its reason by allowing the said application, especially, when the Section would provide that recording its reason is mandatory.

50. As noted above, it is noticed in the application that the accused prays this Court to summon the records from XIV Metropolitan Magistrate, Egmore, VIII Metropolitan Magistrate, George Town, and IV Metropolitan Magistrate, Saidapet and the civil Courts records from the XI Assistant Judge, City Civil Court, Chennai and the records from the Original side of the High Court and the records from the Appellate side of the High Court.

51. I am at a loss to understand as to how those records could be sought to be summoned, when those records from various Courts would not be relevant to decide the issue in question. This is nothing, but an attempt to waste the time of the Court again and to abuse the process of this Court.

52. Under those circumstances, the application in Crl.M.P.No.6440 of 2000 filed under Section 391 Cr.P.C. is liable to be dismissed.

53. In view of the discussions made in the earlier paragraphs with regard to the merits of the appeal, the appeal against the conviction is also liable to be dismissed.

54. Let us now come to the revision seeking for enhancement of sentence.

55. There is no dispute in regard to the powers vested with this Court in revision for enhancement of sentence as laid down by the Supreme Court in PRATAP v. STATE OF U.P. (AIR 1973 S.C. 786) and in the decision of this Court in J.S.AGENCIES AND OTHERS v. M/s. NAMAKKAL SOUTH INDIA TRANSPORTS (1999 (1) CRIMES 70) followed in EKNATH V. STATE OF MAHARASHTRA (AIR 1977 S.C. 1177) AND NADI KHAN v. STATE (AIR 1976 S.C. 2205).

56. Section 138 of the Negotiable Instruments Act provides that the person who committed the offence under this Section shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both.

57. Even though the trial Court held that the offence was proved in respect of the cheque amount to the value of Rs.2 Lakhs, it thought it fit to sentence the accused to undergo imprisonment till the rising of the Court and to pay a fine of Rs.5,000/-.

58. According to the learned counsel for the

petitioner/complainant, this is neither adequate nor in consonance with the spirit of the penal Section.

59. The reading of the Section as well as the guidelines given by the Supreme Court in regard to the necessity of payment of compensation in the cases arising out of the proceedings under Section 138 of the Negotiable Instruments Act would make it obvious that the sentence must be sufficient so as to make the complainant to get suitable compensation.

60. It is true that the Judicial Magistrate is empowered to impose a maximum fine of Rs.5,000/- under Section 29 Cr.P.C. But, it may be pointed out that if the Judicial Magistrate thinks that the fact situation in a particular case warrants imposition of sentence more severe than the limit fixed under Section 29 Cr.P.C., after finding the accused guilty, he can forward to the Chief Judicial Magistrate under Section 325 Cr.P.C. for imposing the fine more than Rs.5,000/-.

61. In this case, such a course has not been adopted by the trial Court which merely sentenced the accused to pay a fine of Rs.5,000/- being the maximum limit of the fine, which the Judicial Magistrate could impose. Another course open to the Magistrate is to invoke Section 357 Cr.P.C. But, the learned Judicial Magistrate has not taken into consideration the fact that the complainant in the complaint itself requested for compensation as contemplated under Section 357 Cr.P.C.

62. This Court as well as the Supreme Court has invariably emphasised the need for making liberal use of Section 357 Cr.P.C. regarding compensation, especially, when the cheque amount is high. Under such circumstances, the learned Judicial Magistrate should have considered for imposing adequate compensation under Section 357 Cr.P.C.

63. There are two limbs in Section 357 Cr.P.C. Under Section 357(1)(b) Cr.P.C., while imposing the sentence of fine, the Judicial Magistrate can award either the portion of the fine or the entire portion as compensation. In other words, the Judicial Magistrate cannot order compensation more than Rs.5,000/-. But, under the second limb of Section 357, namely, 357(3) Cr.P.C., the Judicial Magistrate can award any sum as compensation taking note of the fact situation.

64. In this context, the observation of the Supreme Court in PANKAJBHAI NAGJIBHAI PATEL v. THE STATE OF GUJARAT AND ANOTHER (2001 (1) CRIMES 165 (S.C.)) is worth mentioning:-

ôEven that apart, a Magistrate who thinks it fit that the

complainant must be compensated with his loss he can resort to the course indicated in Section 357 of the Code. This aspect has been dealt with in K.BHASKARAN v. SANKARAN VAIDHYAN BALAN AND ANOTHER (1999 (7) S.C.C. 5 10) as follows:-

However the Magistrate in such cases can alleviate the grievance of the complainant by making resort to section 357(3) of the Code. It is well to remember that this Court has emphasised the need for making liberal use of that provision (HARI SINGH v. SUKHBIR SINGH ((1988) (4) S.C.C. 551). No limit is mentioned in the sub-section and therefore, a Magistrate can award any sum as compensation. Of course while fixing the quantum of such compensation the Magistrate has to consider what would be the reasonable amount of compensation payable to the complainant. Thus, even if the trial was before a Court of Magistrate of the first class in respect of a cheque which covers an amount exceeding Rs.5,000/- the Court has power to award compensation to be paid to the complainant.ö

65. In the light of the above observation, the learned Magistrate could have very well invoked Section 357 (3) Cr.P.C. to award compensation either for the cheque amount or twice the cheque amount or any reasonable amount to alleviate the grievance of the complainant. 66. However, the bar put on the Magistrate in respect of Section 29 Cr.P.C. would not be applicable to the High Court, as Section 357(4) Cr.P.C. would state that the order under Section 357 Cr.P.C. could be used by the High Court, while exercising its power under revision.

67. Therefore, this Court under Section 357(1)(b) could impose a fine which may extend to twice the amount of the cheques and in the event of default in payment of the amount, the accused could be sentenced to imprisonment for a specified period. In the alternative, this Court could invoke Section 357 (3) Cr.P.C. by ordering compensation of any sum and the quantum of compensation could be decided taking note of the fact situation.

68. Out of these two provisions, this Court is of the view that it would be appropriate to invoke Section 357(1)(b) Cr.P.C. by which the accused could be sentenced to pay a substantial fine amount (i.e.,) twice the cheque amount.

69. The trial Court imposed the sentence of imprisonment for only one day. Though this is not sufficient, I am not inclined to send the accused to prison, since her career as Cine Artiste would be spoiled and it may also affect the production of the films in which she is acting. So, instead of enhancing the sentence of imprisonment, it would be appropriate to enhance the sentence of fine to twice the amount of the cheques and the cheque amount can be awarded as compensation to the complainant.

70. Accordingly, the fine amount of Rs.5,000/- imposed by the trial Court is enhanced to Rs.4 Lakhs being twice the cheque amount.

71. It is noticed that the fine of Rs.5,000/- has already been paid in the trial Court. Therefore, the appellant/accused is directed to deposit the balance fine amount, namely, Rs.3,95,000/- in the trial Court within four weeks from today, in default, the accused will undergo rigourous imprisonment for one year. After such deposit, the trial Court is directed to pay the entire cheque amount of Rs.2 Lakhs to the complainant, 72. With the above observation, the revision filed by the petitioner/complainant is liable to be allowed. 73. In the result, the Criminal Appeal and Crl.M.P. No.6440 of 2000 filed by the appellant/ accused are dismissed and the Criminal Revision Case filed by the petitioner/appellant is allowed.

25-1-2002
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Asst.Registrar

To

1. The XV Metropolitan Magistrate,
George Town,Chennai.
2. The Public Prosecutor,
High Court,
Chennai.

M. KARPAGAVINAYAGAM, J.

Common Judgment in
CRL.A.No.261 of 2000;
Crl.R.C. No.736 of 1999;
& Crl.M.P.No.6440 of 2000.

25-1-2002